

MELODIE A. WHITSON (CA SBN 253992)
JOSEPH C. DELMOTTE (CA SBN 259460)
PITE DUNCAN, LLP
4375 Jutland Drive, Suite 200
P.O. Box 17933
San Diego, CA 92177-0933
Telephone: (858) 750-7600
Facsimile: (619) 590-1385

Attorneys for BANK OF AMERICA NATIONAL ASSOCIATION AS SUCCESSOR BY
MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR MORGAN STANLEY MORTGAGE LOAN TRUSTS 2006-6AR

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA - SANTA ROSA DIVISION

In re

AGUSTIN SANTANA AND MARIA
CHAVEZ DE SANTANA,

Debtor(s).

Case No. 10-10113-AJ

Chapter 13

R.S. No. MAW-1939

MOTION FOR RELIEF FROM
AUTOMATIC STAY
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DATE: July 8, 2010
TIME: 9:00 am

99 South "E" Street
Santa Rosa, CA 95404-6524

TO THE RESPONDENTS NAMED ABOVE:

BANK OF AMERICA NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER
TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN
STANLEY MORTGAGE LOAN TRUSTS 2006-6AR¹ ("Movant"), respectfully represents as
follows:

//.

//.

¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004.

1 **RELIEF FROM STAY - CAUSE**

2 **FAILURE TO MAKE POST-PETITION PAYMENTS**

3
4 1. This court has jurisdiction over the subject matter of this Motion pursuant to the
5 provisions of 28 United States Code §§ 157, 1334, and 11 United States Code § 362.

6 2. On or about January 15, 2010, Agustin Santana and Maria Chavez de Santana
7 ("Debtors") filed a voluntary petition under Chapter 13 of the Bankruptcy Code. David Burchard
8 is the appointed Chapter 13 Trustee.

9 3. On or about January 19, 2006, Debtors, for valuable consideration, made,
10 executed and delivered to The Cal-Bay Mortgage Group ("Lender") a Note in the principal sum
11 of \$604,000.00 (the "Note"). Pursuant to the Note, Debtors are obligated to make monthly
12 principal and interest payments commencing March 1, 2006, and continuing until February 1,
13 2036, when all outstanding amounts are due and payable. A true and correct copy of the Note is
14 attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit A
15 and incorporated herein by reference.

16 4. On or about January 19, 2006, Debtors made, executed and delivered to Lender a
17 Deed of Trust (the "Deed of Trust") granting Lender a security interest in the certain real
18 property located at 2607 Marlow Road, Santa Rosa, California 95403 (hereinafter "Real
19 Property"), which is more fully described in the Deed of Trust. The Deed of Trust provides that
20 attorneys' fees and costs incurred as a result of the Debtor's bankruptcy case may be included in
21 the outstanding balance under the Note. The Deed of Trust was recorded on January 27, 2006, in
22 the Official Records of Sonoma County, State of California. A true and correct copy of the Deed
23 of Trust is attached to the Declaration in Support of Motion for Relief From Automatic Stay as
24 exhibit B and incorporated herein by reference.

25 5. Subsequently, Lender's beneficial interest in the Deed of Trust was sold, assigned
26 and transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of
27 Trust evidencing the Assignment of the Deed of Trust to Movant is attached to the Declaration in
28 Support of Motion for Relief From Automatic Stay as exhibit C and incorporated herein by

1 reference.

2 6. The obligations under the Note are in default for failure to make payments as of
3 May 1, 2009. As of May 27, 2010, the total obligation due and owing under the Note is in the
4 approximate amount of \$654,468.51, representing the principal balance of \$602,899.96, interest
5 in the sum of \$45,245.74, late charges in the amount of \$1,401.03, escrow advances in the
6 amount of \$4,044.89, a recoverable balance of \$3,048.71, and other fees of \$62.50, less a
7 suspense balance of \$<2,234.32>. Moreover, the total arrears under the Note are in the
8 approximate sum of \$53,822.67, excluding the post-petition attorneys' fees and costs incurred in
9 filing the instant Motion. This is an approximate amount for purposes of this Motion only, and
10 should not be relied upon as such to pay off the subject loan as interest and additional advances
11 may come due subsequent to the filing of the Motion. An exact payoff amount can be obtained
12 by contacting Movant's counsel.

13 7. Pursuant to 11 United States Code § 1322, and the Debtor's Chapter 13 Plan, the
14 Debtor is obligated to make all post-petition payments owing on the Note directly to Movant.
15 However, Movant has not received the post-petition payments owing for April 1, 2010 through
16 May 1, 2010. Accordingly, the post-petition arrears owing under the Note are in the approximate
17 sum of \$7,407.84, consisting of two (2) payments of \$3,703.92 each, excluding the post-petition
18 attorneys' fees and costs incurred in filing the instant Motion. A true and correct copy of the
19 post-petition payment accounting pursuant to Local Rule 4001-1(g)(1) is attached to the
20 Declaration in Support of Motion for Relief From Automatic Stay as exhibit D and incorporated
21 herein by reference.

22 8. A debtor's failure to make post-petition mortgage payments as they become due in
23 a Chapter 13 case constitutes "cause" for relief from the automatic stay pursuant to 11 United
24 States Code § 362(d)(1). In re Ellis, 60 B.R. 432, 435 (B.A.P. 9th Cir. 1985). Accordingly, as
25 the Debtor has failed to make post-petition payments under the Note, Movant is entitled to relief
26 from the automatic stay pursuant to 11 United States Code § 362(d)(1).

27 ///
28 ///
29

1 **RELIEF FROM STAY**

2 **LACK OF EQUITY**

3 9. Movant is informed and believes that, based on the Debtors' bankruptcy
4 Schedules, the fair market value of the Real Property is no more than \$392,000.00. True and
5 correct copies of Debtor's bankruptcy Schedules A and D are collectively attached to the
6 Declaration in Support of Motion for Relief From Automatic Stay as exhibit E and incorporated
7 herein by reference.

8 10. Based on the above, under the best case scenario, Movant is informed and
9 believes that the equity in the Real Property is as follows:

Fair Market Value:	\$392,000.00
Less:	
Movant's Trust Deed	\$654,468.51
Chase Manhattan's 2nd Deed of Trust	\$97,154.00
Costs of Sale (8%)	<u>\$31,360.00</u>
Equity in the Property:	\$<390,982.51>

14 As a result, there is little to no equity in the Real Property to be realized by the Debtor or
15 the bankruptcy estate. Further, as the Debtor is unable to service the debt on the Real Property,
16 Movant contends that the Real Property is not necessary for an effective reorganization.
17 Therefore, Movant is entitled to relief from stay under 11 United States Code § 362(d)(2).

18 11. If Movant is not allowed to regain possession of and to foreclose on the Real
19 Property it will suffer irreparable injury, loss and damage.

20 **RELIEF FROM STAY - CAUSE**

21 **ADEQUATE PROTECTION**

22 12. Pursuant to the provisions of 11 United States Code §§ 361 and 362(d), Movant is
23 entitled to adequate protection of its interest in the Real Property.

24 13. Movant submits the adequate protection in this case requires normal and periodic
25 cash payments, as called for by the Note, plus the repayment of any and all delinquent amounts
26 owed to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

27 ///

28 ///

1 14. Movant is informed and believes that Debtor is presently unwilling or unable to
2 provide adequate protection to the Movant and there is no probability that adequate protection
3 can be afforded to Movant within a reasonable time.

4 15. By reason of the foregoing, Movant is entitled to relief from stay under 11 United
5 States Code § 362(d)(1), based upon the failure of Debtor to provide adequate protection to
6 Movant and to make payments as required by 11 United States Code § 1322.

7 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

8 1) Terminating the automatic stay of 11 United States Code § 362, as it applies to the
9 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of
10 Trust;

11 2) That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

12 3) Granting Movant leave to foreclose on the Real Property and to enforce the
13 security interest under the Note and the Deed of Trust, including any action necessary to obtain
14 possession of the Property;

15 4) Permitting Movant to offer and provide Debtor with information re: a potential
16 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
17 Mitigation Agreement, and to enter into such agreement with Debtor;

18 5) Alternatively, in the event this court declines to grant Movant the relief requested
19 above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to
20 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust
21 and all other deeds of trust encumbering the Real Property, including Debtor's obligations to pay
22 when due (a) the monthly installments of principal and interest, as required under the Note;
23 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor in order
24 to protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred
25 in the filing of this motion;

26 6) That the attorneys' fees and costs incurred by Movant for filing the instant Motion
27 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy
28 law; and

1 7) For such other and further relief as the court deems just and proper.

2 Dated: June 9, 2010

PITE DUNCAN, LLP

3

4

/s/ JOSEPH C. DELMOTTE (CA SBN 259460)
Attorneys for BANK OF AMERICA NATIONAL
ASSOCIATION AS SUCCESSOR BY MERGER
TO LASALLE BANK NATIONAL
ASSOCIATION, AS TRUSTEE FOR MORGAN
STANLEY MORTGAGE LOAN TRUSTS 2006-
6AR

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28